

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of Hari Saran Moitra v. Bhubaneswari Debi (for self and as guardian of her minor son Jotindra Mohun Lahiri) and Nilcomul Lahiri, from the High Court of Judicature at Fort William, in Bengal; delivered 21st April 1888.*

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Present :

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

In 1870 Uma Soondari Debi, the mother of the Appellant, and daughter and heiress of Raghumoni, who was one of five brothers, sons of Roma Nath Lahiri, forming a joint Hindu family, brought a suit against Bhubaneswari Debi, the widow of Shib Nath, one of the brothers, who had managed the family property, Nilkomul, the son of Koli Mohun, another brother, and Kanaktara, the widow of Krishnamoni, another brother. These were the only members of the family who were then alive, Ram Mohun, the fifth brother, having died without issue, leaving a widow, who was then also dead. In the suit Uma Soondari claimed to recover possession of her father's share of the family property, which was said in the plaint to consist of land mentioned in schedules Nos. 1 and 2, and pucca buildings and personal pro-

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perties. Schedule No. 1 contained the lands which the brothers had inherited from their father, and No. 2 the lands which were said to have been acquired whilst the members of the family were living in commensality. On the 13th December 1872 the Subordinate Judge of Rungpore made a decree in favour of Uma Soondari in respect of part of the share which she had claimed. Thereupon Bhubaneswari, Uma Soondari, and Nilkomul separately appealed to the High Court, which, on the 22nd December 1874, made a decree in the following terms :—“ It is ordered and decreed that the decree of the Lower Court be varied, and in lieu thereof it is hereby decreed and declared that the Plaintiff is entitled to 3 annas and 4 gundahs share (the share claimed) of all the property which is named and described in the two schedules appended to the plaint.” And Uma Soondari having before the suit been put in possession of 2 annas of the property named in and described in the first schedule, it was ordered and decreed that she should recover from the Defendants possession of the remaining 1 anna and 4 gundahs, and possession of 3 annas 4 gundahs of the property named and described in the second schedule. Thereupon Bhubaneswari appealed to Her Majesty in Council, who, by an Order in Council, made on the 20th day of November 1880, affirmed the decree of the High Court. Whilst the appeals were pending in the High Court, Bhubaneswari adopted a son, Jotindra Mohun Lahiri, but she continued to prosecute her appeal in that Court, and appealed to Her Majesty in Council in her own name, taking no notice of the adoption. On the 9th April 1881, Uma Soondari having died, the Appellant as her heir made an application to the Court of the Subordinate Judge for execution of the decree. It stated that the enforcement of the decree was sought against

Bhubaneswari for self and as guardian on behalf of the minor Jotindra Mohun Lahiri, and against Nilkomul Lahiri. Execution was not sought against Kanaktara, who was said in the judgement of the High Court to have made no defence to the suit. The reason of this may be that she was not in possession of more than her husband's share. On the 12th of April 1881 the Appellant brought a suit in the same Court for mesne profits, naming as the Defendants Bhubaneswari Debi, for self and as guardian and executor of Jotindra Mohun Lahiri, minor, and Nilkomul Lahiri. The Subordinate Judge, on the 10th January 1882, gave judgement in both cases, referring in one judgement to the other where the question appeared to him to be the same. The judgements will be more conveniently stated hereafter. In the execution case Jotindra Mohun, by his next friend Rudra Chunder Roy, appealed to the High Court. This person had presented a petition of objection, as next friend of the minor, to the Court of the Subordinate Judge. He was not shown to have obtained any authority to act as next friend of the minor, and is said to have been a servant of Bhubaneswari. She also appealed, taking the same objections as regards the minor as were taken by the assumed next friend. Nilkomul also appealed, and Hari Sarun Moitra the present Appellant filed objections by way of cross appeal. In the suit for mesne profits both Bhubaneswari and Nilkomul separately appealed.

On the 9th of June 1884 the High Court gave judgement in the suit for mesne profits, and on the 10th in the execution case, and the present appeal is from the orders or decrees made upon those judgements.

In the execution case there are three questions,—1, whether execution can be had against the minor personally or against Bhubaneswari ;

2, whether the pucca buildings and moveables are to be included in the execution ; 3, whether possession in execution was to be given against the parties jointly or severally. Upon the first of these questions the Subordinate Judge said,—

“ Whether the execution in this case should proceed against the minor personally or against his adoptive mother is a point which has been equally raised and decided in the decree-holder's suit for wasilat, No. 26 of 1881. The question being similar the same judgement should govern them both. I hold, therefore, under the decision I have this day delivered in the trial of issue 7 in the above suit for wasilat, that the execution should be carried out against the minor, and hence against the estate left by his adoptive father. Bhubaneswari, for herself, cannot be made personally liable when the assets of her husband are available at hand to fulfil the conditions of the decree. Then, as apparent from the record of the Suit No. 26, Bhubaneswari was a Defendant in the original suit in the capacity of a representative and in possession of her husband's estate. That possession is still with her, though, since the adoption, it has been converted to on behalf of her minor son. The minor is also under her guardianship and protection. Bhubaneswari is, therefore, the proper person to represent the minor, and I do not think it equitable that Rudra Chander Roy, almost a stranger, should be allowed to stand on behalf of the minor when his connection is far remoter than that of Bhubaneswari, who protects the minor, and is his nearest kindred as the adoptive mother.”

On the same question the High Court said,—

“ The present appeal arises out of proceedings taken to execute the decree in the title suit passed by the High Court, and confirmed on appeal by the Privy Council. It is contended that that decree cannot be executed against the minor Jotindra Mohun Lahiri, because he was not a party to it, and those steps which, according to law, might have been taken to make him a party were not taken. Section 372 of the Code of Civil Procedure provides for making the assignee or other transferee of the interest of a Defendant a party to the suit when the assignment or transfer has been made during the pendency of the suit. No action was taken under this section. It has been urged that the devolution of the Defendant's interest upon the adopted son by reason of the adoption was not known to the decree holder, and that therefore he could not take the necessary steps to make the minor a Defendant. This may be so, but upon this point we pronounce no opinion. We further pronounce no opinion upon the question whether the minor is bound by the decree in the title suit. All we

decide on the present occasion is that the decree cannot be executed against the minor because he is not a party judgement debtor upon the record."

Their Lordships find a difficulty in understanding what the High Court meant by this judgement. The Code of Civil Procedure referred to must be Act X. of 1877, as Section 372 of the previous Code relates to special appeals. Act X. of 1877 came into force on the 1st October 1877, nearly three years after the decree of the High Court. If it was material that no action was taken under Section 372, it appears to their Lordships that the question whether the adoption was or was not known to the decree holder was a matter upon which an opinion should have been pronounced. What follows is still more difficult to be understood. The Court say, "We pronounce further no opinion upon the question whether the minor is bound by the decree in the suit; all we decide on the present occasion is that the decree cannot be executed against the minor because he is not a party judgement-debtor upon the record." In the suit for mesne profits, where Bhubaneswari was sued as widow for self and as guardian on behalf of the minor, they say, (p. 108, 2nd Record), "Now there can be no doubt that making a person's guardian Defendant to a suit is not the same as making that person himself a party, and this is not affected by the fact of his being a minor. . . . A minor, in order to be bound by the result of legal proceedings, must be made a party to the suit in his own name," and decide that the minor was not bound by the decree. Their Lordships are unable to see why the High Court, having said in the suit for mesne profits that the minor was not bound by the decree, declined on the next day to pronounce an opinion upon the question.

It was just as necessary to decide the question in the execution proceedings as in the suit for

mesne profits. The decree in the original suit was sought to be enforced against Bhubaneswari personally and as guardian of the minor. So far as he was concerned the sole question was whether the decree bound him. If it did execution was rightfully sought against him through his guardian, and it was no answer that his name was not on the record.

The decree of the Subordinate Judge, made as it was before the adoption, when Bhubaneswari was the owner of the estate and fully represented it, was binding on the minor. It took away part of the estate of which Shib Nath was in possession when he died. After the adoption it was for the interest of the minor that Bhubaneswari's appeal should be prosecuted, and the appeals of Uma Soondari and Nilkomal defended. Bhubaneswari's estate had been divested, and she could obtain nothing, but as the adoptive mother and guardian of the minor it would be right for her to continue to defend the suit. There has been no suggestion that it was improperly defended, or that the appeal to Her Majesty in Council was not proper. In his judgement in the suit for mesne profits the Subordinate Judge says,—“ In fact, the appeals were prosecuted and “ defended by her with the *bona fide* intention “ that her husband's real rights had been inter- “ fered with.” If her appeal had been successful, Bhubaneswari, as the guardian of the minor, would have been kept in possession of the whole of what Shib Nath died possessed of, and would have been accountable to the minor for it. In *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah*, 3, Moore, I. A., 229, a Hindu widow brought a suit for partition, and to be put in possession of her husband's share in the joint undivided estate. Pending the suit she adopted a son, and, notwithstanding the adoption, the suit was prosecuted in the widow's name, and a decree made directing her to be put in possession. Their

Lordships said (page 243),—" All the facts being  
 " stated, it is assumed as matter of law that,  
 " after she had executed the act of adoption, she  
 " prosecuted the suit only as guardian of her  
 " adopted son. Then, as the suit must be con-  
 " sidered as afterwards prosecuted by her in her  
 " name for his benefit, the decree must be con-  
 " sidered for his benefit, and that she is put in  
 " possession as trustee for him." Their Lordships  
 are of opinion that this principle is applicable  
 in the present case, that the minor is bound by  
 the decree in the title suit, and the High Court  
 was in error in allowing his appeal in the  
 execution case, which they have done by their  
 decree in the Appeal No. 97.

The next question is as to the pucca build-  
 ings and moveables. The decree of the High  
 Court in the original suit was,—“ It is ordered  
 “ and decreed that the decree of the Lower  
 “ Court be varied, and in lieu thereof it is  
 “ hereby decreed and declared that the Plaintiff  
 “ is entitled to 3 annas and 4 gundahs share of  
 “ all the property which is named and described  
 “ in the two schedules appended to the plaint.”  
 The moveables were in a separate inventory, and  
 it is now admitted that execution cannot be had  
 in respect of them. As to the pucca buildings  
 the Subordinate Judge said,—“ I consider it to  
 “ have been purely the intention of the High  
 “ Court that, in awarding a decree in favour of  
 “ the Plaintiff for a 3 annas 4 gundahs share of  
 “ all the property which is named in the two  
 “ schedules, only the landed property was meant,  
 “ and decided upon without relevancy to the  
 “ buildings or moveables.” But as it had been  
 contended that the decree literally included the  
 buildings, he thought it equitable that the decree  
 should be returned to the decree holder for  
 amendment in the proper Court, and then the  
 execution be revised in conformity with the

judgement. The judgement of the High Court upon which the decree was drawn up used exactly the same words, and so there could be no amendment. The effect, therefore, was that execution in respect of the pucca buildings was refused.

The High Court dealt with the question in a rather singular way. They said that, in order to discover what the property was, they must refer to the two schedules appended to the plaint, and as the decree holder had taken no steps to have the original plaint made a part of the execution record, or to file a certified copy of the two schedules, they were unable to discover from the record whether the pucca buildings and the moveable property were or were not included in the schedules annexed to the plaint. The Subordinate Judge had inserted in his decree two schedules which were described as schedules of immoveable property under claim, and had awarded a  $2\frac{1}{2}$  annas share of the landed properties stated in those schedules. The High Court varied the decree by giving a larger share. It was obvious that they intended this to be a share of the same property, viz., what was described in the decree of the Subordinate Judge as under claim, that is, claimed in the plaint. If proof of the contents of the schedules to the plaint was necessary, the Court might have postponed giving judgement, and allowed a certified copy to be filed. Their Lordships are of opinion that such proof was not necessary, and that the cross appeal upon this question, which was No. 125, ought to have been allowed, and the order appealed from varied by including the pucca buildings.

As to the 3rd question, namely, whether possession in execution was to be given against the parties jointly or severally, which was raised in the Appeal No. 126, the High Court decided that



the decree ought to be executed by giving the decree holder as against Bhubaneswari and Nilkomul a 1 anna 4 gundahs in the plots of which he already had possession of 2 annas, and 3 annas 4 gundahs of the plots in which he had no possession. They accordingly ordered, in the Appeals Nos. 125 and 126, that the objections or cross appeal should be disallowed, and, except as aforesaid, the order of the Subordinate Judge should be varied by awarding to the decree holder possession jointly as against Bhubaneswari and Nilkomul of an undivided share of 3 annas 4 gundahs in every plot of the land in dispute.

The learned Counsel for the Appellant has not disputed that the possession is rightly awarded jointly against the parties liable to have it recovered from them.

So far, the decree of the High Court may stand; but their Lordships being of opinion, as has been stated, that the minor is bound by the decree, and that execution may be had against him, the decree in the Appeal No. 97 will be reversed, and the appeal dismissed with costs, and the decree in Nos. 125 and 126 will be varied by ordering that Appeal No. 125 should be dismissed with costs, and by allowing the Plaintiff's objections or cross appeal so far as regards the pucca buildings, and by including them in the award of possession. And their Lordships will humbly advise Her Majesty accordingly.

The action for mesne profits has now to be considered. In this the questions are, 1, whether the liability was joint or several; 2, whether Jotindra Mohun was liable. In the title of the plaint the Defendants are stated to be Bhubaneswari Debi, widow of the late Shib Nath Lahiri, for self, and as guardian and executor of Jotindra Mohun Lahiri, minor, and Nilkomul Lahiri.

The Subordinate Judge decided that the liability of the Defendants should be separately assessed, and looking at the possession of the joint ancestral property, which he said had been fully admitted in the suit by all the parties concerned in it, he found that out of the 1 anna 4 gundahs share in the joint ancestral property which had been decreed in favour of the Plaintiff,  $13\frac{2}{3}$  gundahs share was in possession of Bhubaneswari, and  $10\frac{1}{3}$  gundahs share in the possession of Nilkomul. Accordingly he decided that, with respect to the land held in common, the mesne profits were to be calculated and separately charged in these proportions. As to the second question, he said that the appeals to the High Court and Her Majesty in Council were prosecuted by Bhubaneswari "with the *bonâ fide* intention that her husband's real "rights had been interfered with," and inasmuch as it was for the interest of Jotindra Mohun that the suit was defended and the suit carried up to the highest tribunal, he held him to be liable for the mesne profits. The decree awarded for mesne profits within the period allowed by the law of limitation a total sum of Rs. 5,692. 7. 2 pies, and ordered that the Plaintiff should recover from Bhubaneswari as guardian on behalf of the minor Jotindra Mohun Rs. 3,297. 10. 2 pies, and from Nilkomul Rs. 2,394. 13 annas. Both Nilkomul and Bhubaneswari appealed to the High Court,—the former on the ground that the Plaintiff was not entitled to recover from him the  $10\frac{1}{3}$  gundahs share, and at the most he was not liable to make good more than 2 gundahs, and Bhubaneswari on the ground that Jotindra Mohun was not properly made a party to the suit, and should not have been held liable.

The High Court in their judgement deal first with this question. They say, "In the plaint "the minor is not made a Defendant. The De-

" fendants are Nilkomul Lahiri and Bhubanes-  
 " wari Debi as widow of the late Shib Nath  
 " Lahiri, and as guardian on behalf of the minor  
 " Jotindra Mohun Lahiri. Now there can be no  
 " doubt that making a person's guardian De-  
 " fendant to a suit is not the same as making  
 " that person himself a party, and this is not  
 " affected by the fact of his being a minor.  
 " There is no excuse for ignorance as to the  
 " proper procedure in respect of minors, seeing  
 " that the provisions contained in the present  
 " Code of Civil Procedure became law nearly  
 " seven years ago, in 1877. A minor in order to  
 " be bound by the result of legal proceedings  
 " must be made a party to the suit in his own  
 " name." And after referring to the provisions  
 for the appointment of a guardian *ad litem* they  
 say, " No defence was filed in the suit as on be-  
 " half of the minor, and it appears to us clear  
 " that the minor has not become a party to these  
 " proceedings so as to be bound by the decree,"

In *Suresh Chunder Wum Chowdhry v. Jagut  
 Chunder Deb*, Indian Law Rep., 14 Calcutta  
 Series, 204, a plaint in a suit described one of  
 the Defendants thus,—“ N. C., guardian, on  
 “ behalf of her own minor son, S. C.,” and it  
 was held by a Full Bench of the High Court at  
 Calcutta that, it appearing that the suit was  
 substantially brought against the minor, and the  
 error of description in the plaint being one of  
 mere form, it could not, without proof of pre-  
 judice, invalidate a decree against him in the  
 suit; also, that the want of a formal order ap-  
 pointing a guardian *ad litem* was not fatal to  
 the suit when it appeared on the face of the  
 proceedings that the Court had sanctioned the  
 appointment. Their Lordships are satisfied that  
 the suit for mesne profits was substantially  
 brought against the minor. The 7th issue  
 decided by the Subordinate Judge contained the  
 question whether he could be made liable when

he was not a party in the former suit. And the grounds of appeal in Bhubaneswari's appeal to the High Court show that she appealed on his behalf as well as her own. It is also apparent that the Subordinate Judge treated her as appearing in the suit as guardian, and sanctioned it. This is very clear in his judgement in the execution case before quoted. He says, "The minor is also under her guardianship and protection, Bhubaneswari is therefore the proper person to represent the minor." Their Lordships, therefore, are of opinion that the High Court was in error in decreeing that the suit should be dismissed as against Jotindra Mohun, and declaring that he was not a party to it and was not bound by the result of the proceedings.

In the appeal by Nilkomul, the High Court said that the Subordinate Judge did not find that Nilkomul was in possession of any portion of the property in excess of the share to which he was himself legally entitled, but that he had been in possession of 6 annas 10 gundahs had been practically admitted before them at the hearing of the appeal, while a title to more than 6 annas 8 gundahs was not asserted. It was also admitted in his written statement. They thought, therefore, that, except as regards the 2 gundahs, the Plaintiff had not proved that Nilkomul was, during the years for which mesne profits were claimed, in possession of any portion of the property, the title to which was concluded by the decision in 1880. They therefore held that, as regards the 2 gundahs, there must be a decree for mesne profits calculated upon the figures which the Subordinate Judge had taken in his decree. Accordingly they varied his decree by decreeing that Nilkomul should pay, instead of the sum awarded by that decree, the sum of Rs. 475 only, as mesne profits, with interest thereon from the 10th of January 1882, the date

of the decree of the Lower Court. The learned Counsel for the Appellant did not object to this decision, nor did the learned Counsel who appeared for Bhubaneswari and the minor object to it. Further, it is not disputed that the aggregate of the portions of the property of which Nilkomul and Bhubaneswari have been in possession during the years for which mesne profits have been awarded shows an excess over their lawful shares at least equal to the share of which the Plaintiff has been wrongfully deprived. Consequently, if Nilkomul held only 2 gundahs, Jotindra Mohun would be liable for the mesne profits of the remainder, and the Plaintiff would be entitled to recover the balance of the total sum of Rs. 5,692. 7. 2 pies awarded for mesne profits from his estate. This would be Rs. 5,217. 7. 2. Therefore the decree of the High Court in the appeal by Bhubaneswari (Appeal No. 130 of 1882) should be reversed, and the appeal dismissed with costs, and in lieu thereof, and of the decree of the Subordinate Judge, it should be decreed that the Plaintiff do recover from Bhubaneswari as guardian on behalf of the minor, Jotindra Mohun, the sum of Rs. 5,217. 7. 2, with interest at 6 per cent. per annum from the 10th January 1882, and costs of the suit in the first Court in proportion to the whole of the claim allowed. The decree of the High Court in appeal No. 121 of 1882, so far as it relates to payment by Nilkomul Lahiri and to costs, will be affirmed. Their Lordships will humbly advise Her Majesty accordingly.

With regard to the costs of these appeals, their Lordships think that the proper course will be to order the Appellant to pay the costs of the Respondent Nilkomul, and that the Appellant's costs, but not including what he is ordered to pay to Nilkomul, be paid by Bhubaneswari as guardian on behalf of the minor.

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